

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 5436 IN THE)	
NAME OF JEROME CHEESE)	AMENDED
COMPANY)	PRELIMINARY ORDER
_____)	

On October 12, 1999, the hearing officer for the Idaho Department of Water Resources ("Department") issued a Preliminary Order in connection with the above captioned matter. On October 26, 1999, Jerome Cheese Company filed a Petition for Reconsideration ("petition") with the Department which was granted on October 28, 1999. The protestants did not file any timely response with the Department.

The hearing officer has reviewed the petition in detail and responds to it as follows:

Paragraphs 1 through 6 - Consists of statements to which no response is necessary.

Paragraph 7

Assertion: Contrary to the Preliminary Order, Dr. Brockway did not state that "most" of the ground water from the original point of diversion is tributary to the Snake above Neeley or Minidoka. Nor did he state that only a "small" amount of water from the Hincks diversion point would reach the Jerome area and/or Thousand Springs.

Response: It is true that the applicant's consultant did not use the word "most" when describing the amount of unpumped water at the Hincks well which would reach the Snake River and did not use the word "small" when describing the amount of ground water which would reach the Jerome area. The consultant, however, on four different occasions either stated or acknowledged as correct that the "majority" of water not pumped at the Hincks well is tributary to springs which enter the Snake River in the Blackfoot to Neeley reach or below Neeley. He also stated that "some" of the unpumped water will go west in the aquifer and also used the word "significant" when describing the amount of water flowing west. See the discussion of "significant" in the response to paragraph 9 below.
Finding of Fact 10 has been changed in this Amended

Preliminary Order to show the language specifically used by the consultant.

Paragraph 8 Consists of a statement to which no response is necessary.

Paragraph 9

Assertion: At the hearing, Dr. Brockway stated that he was unable, at that time, to quantify how much of the ground water would reach the Snake above Milner versus how much flowed toward Jerome and Thousand Springs. Although Dr. Brockway was unable to place any precise number on the diversion, he did indicate that a substantial quantity (as related to a “small” amount) of the ground water flowed toward the Jerome area.

Response: The applicant’s expert witness did not state that a “substantial” quantity of ground water would flow toward the Jerome area. He said a “significant” quantity of ground water would flow toward Jerome. He then said “statistically speaking, significant generally means you are 95% sure that something is going to happen and is big enough to be significant.” He also described “significant” as being “large enough to be sure that it occurred and that you can ascribe a benefit to it.” The expert did not define “significant” in terms of its more common meaning of “a lot” or “much.” The expert could not quantify how much water in terms of percentage, rate or volume which would flow toward the Jerome area.

The assertion does not require or justify changes to the order.

Paragraph 10

Assertion: Dr. Brockway’s testimony, as summarized above, is not consistent with the statement in the Preliminary Order that “most” of the water will fall into the Snake above Jerome, and that only a “small” amount will reach wells in the Jerome area.

Response: See responses to Paragraphs 7 and 9 above.

Paragraph 11

Assertion: Dr. Brockway also testified to the projected “water budget” for the proposed new use of the Hincks right. The water

budget took into account water conservation practices at the plant (which reduced the need for input water) and the addition of new water inputs to the system (so-called “cow water” extracted from milk, as well as “moisture in product”).

Dr. Brockway concluded that, owing to these new inputs, the system-wide operation is not only non-consumptive, but that it actually adds water to the hydrologic system.

Response: The application for transfer does not create more water. Cow water is water attributable to different water rights than the right sought for transfer and is already available to the applicant and is being used by the applicant. The applicant’s expert did not know how much unpumped ground water at the Hincks well site would reach the Jerome area. Hence estimates of water being “added” to the hydraulic system as a result of the transfer are not supportable.

The assertion does not require or justify changes to the order.

Paragraph 12

Assertion: Dr. Brockway testified that, taking into account (1) the water budget and (2) the “substantial” amount of water which would reach Jerome from the Hincks point of diversion, it is reasonable to conclude that Jerome area would experience a net improvement in water availability as a result of the transfer.

Response: See response to paragraphs 7, 9 and 11 above.

The assertion does not require or justify changes to the order.

Paragraph 13

Assertion: Although Dr. Brockway was careful to avoid offering a legal conclusion, it follows that a net improvement in the availability of water to the area means that the transfer will not result in injury to other users in the vicinity of Jerome.

Response: The Department denied the application, since it is not in the local public interest to approve the transfer and allow a use of water which would otherwise be prevented by the existing moratorium in the Snake Plain Aquifer area.

The assertion does not require or justify changes to the order.

Paragraph 14, 15 and 16 Responses are not appropriate, since the paragraphs are repetitive of other assertions above.

Paragraph 17

Assertion: The Preliminary Order failed to address or take into account the water budget analysis offered by Dr. Brockway.

Response: The assertion is incorrect, since the water budget analysis was received as an exhibit and was considered in the Preliminary Order. The analysis improperly includes "external" water associated with other water rights which are not a proper part of the analysis to determine enlargement. Public interest, however, not enlargement, was the basis of denial of the application. Also see the response to paragraph 13 above.

The assertion does not require or justify changes to the order.

Response to Relief Requested:

The Department should not make any changes to the Preliminary Order other than to Finding of Fact 10 as described above.

Response to Timing Requested:

The Department should not suspend action on the application for up to two years, as suggested by the applicant, to allow time to gather more information. The Department scheduled and held the hearing as requested and urged by the applicant. Failure of the applicant to provide information which it could have presented at the hearing is not reason to delay a decision in the matter or to rehear the matter at some later date.

Based upon his understanding of the law and the facts in this matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Amended Preliminary Order:

FINDINGS OF FACT

1. On May 10, 1995, the Department issued License No. 35-08606 in the name of Roy E. Hincks as follows:

Source: Groundwater
Priority: July 1, 1985
Rate of diversion: 6.07 cubic feet per second ("cfs")
Volume: 1214 acre feet per year ("afy")
Point of diversion: NE1/4NW1/4, Section 16, T4S, R31E, B.M. ("Hincks" well)
Use: Irrigation
Season of use: April 1 to October 31
Place of use: 303.5 acres within parts of Section 16, T4S, R31E, B.M.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. On March 3, 1999, Roy Hincks ("Hincks") and Davisco Foods, Inc. ("Davisco") entered into a Memorandum of Agreement in which Hincks agreed to sell 160 miner's inches (3.2 cfs) of water from License No. 36-08606 to Davisco.

3. On March 8, 1999, Jerome Cheese Company ("applicant") filed Application for Transfer No. 5436 ("application") with the Department seeking to change the point of diversion, place of use, season of use and nature of use of a portion of License No. 35-08606. The applicant proposes to cease the diversion of 3.2 cfs and 480 afy of ground water from the Hincks well and to divert the water from two new wells to be drilled in the NWNE Section 25, T8S, R16E, B.M. near Jerome, Idaho. The applicant also proposes to cease the irrigation of 160 acres in Section 16, T4S, R31E, B.M. and to change the season and nature of use to year-round commercial use in an existing cheese plant ("plant") in Section 25, T8S, R16E, B.M. near Jerome. The commercial use will consist of washing cheese processing equipment and washing cheese during production.

4. The Department published notice of the Application which was subsequently protested by Bill Chisholm, Lee Halper, Darcy Thornborrow and Michael Ihler ("protestants").

5. Issues identified by the protestants are as follows:

- a. The proposed changes will injure other water rights.
- b. The proposed changes will constitute an enlargement in use of the original right.
- c. The proposed changes are not in the local public interest.
- d. The proposed changes are not consistent with the conservation of water resources within the state of Idaho.

6. On July 27 and 28, 1999, the Department conducted a hearing in the matter in Twin Falls, Idaho. The applicant was present and was represented by Christopher Meyer and Mike Creamer. Protestants Bill Chisholm, Lee Halper and Michael Ihler were present and represented themselves. Darcy Thornborrow was represented by Pat Brown. The hearing officer allowed the city of Jerome ("city") to participate as a public witness as provided in IDAPA 37.01.01355 (Procedure Rule 355). The city did not appear as a public witness at the hearing, but on August 13, 1999, submitted written comments for consideration. On August 31, 1999, the applicant responded to the public witness comments of the city.

7. Exhibits premarked, offered or accepted as a part of the record are as follows:

- a. Applicant's Exhibit 1 - Schematic generally showing water flow through cheese plant
- b. Applicant's Exhibit 2 - Schematic titled Jerome Cheese Economic Factors in Magic Valley
- c. Applicant's Exhibit 3 - Bar chart titled Jerome Cheese Company Water Conservation Measures
- d. Applicant's Exhibit 4 - Snake Plain Aquifer
- e. Applicant's Exhibit 5 - Jerome Cheese Water Right Transfers Annual Water Budget Comparisons
- f. Applicant's Exhibit 6 - Jerome Cheese Co. Water Use Schematic
- g. Applicant's Exhibit 7 - NOT OFFERED
- h. Applicant's Exhibit 8 - NOT OFFERED
- i. Applicant's Exhibit 9 - Well Interference Analysis Proposed Jerome Cheese Well(s) $Q = 0.66$ cfs
- j. Applicant's Exhibit 10 - Well Interference Analysis Proposed Jerome Cheese Well(s) $Q = 3.2$ cfs
- k. Applicant's Exhibit 11 - Well Interference Analysis Proposed Jerome Cheese Well(s) $Q = 3.86$ cfs (Sandy and Hincks Transfers)
- l. Applicant's Exhibit 12 - NOT OFFERED
- m. Applicant's Exhibit 13 - Summary of Jerome Cheese Water Transfers

- n. Applicant's Exhibit 14 - Blue line print - Site Plan for Jerome Cheese
- o. Applicant's Exhibit 15 - Blue line print - Wellhouse Water Supply Plan and Elevations for Jerome Cheese
- p. Applicant's Exhibit 16 - Second Addendum to Agreement for Sale of Water Right
- q. Applicant's Exhibit 17 - First Addendum to Agreement for Sale of Water Right
- r. Applicant's Exhibit 18 - GIS shape file
- s. Applicant's Exhibit 19 - GIS shape file - Sandy Property
- t. Protestant's Exhibit A - Letter dated July 20, 1999 to Robert E. Williams from Gary G. Allen together with a draft Complaint for Declaratory Relief

8. The applicant presently receives ground water from the city for the plant. The applicant wants to obtain its own water supply due to concerns about water quality (sediment), water pressure and the cost of water provided by the city. Water available from the city may be used as a backup source of supply. The water sought for transfer under this application is in addition to that sought under Application for Transfer No. 5401 which also was submitted in the name of Jerome Cheese Company.

9. The proposed new wells are located down gradient of the licensed well a distance of approximately 90 miles. The well design for one well proposes a 12" diameter bore to a total depth of about 400 feet. The proposed surface seal is a 20" diameter initial bore to a depth of 80 feet with a 16" diameter casing to be installed in the 20" hole. The design discharge is 1,000 gallons per minute. The design has been reviewed and approved by the Division of Environmental Quality, Idaho Department of Health and Welfare. The second well has not been designed yet.

10. The applicant's expert testified that the "majority" of water not pumped at the Hincks well is tributary to springs which enter the Snake River in the Blackfoot to Neeley reach or below Neeley. He also stated that "some" of the unpumped water will go west in the aquifer and that ground water reaching the Snake River would not again be available as ground water in the Snake Plain Aquifer.

11. The protestants allege that dairies are not in the local public interest, and that since the cheese plant uses milk originating from dairies, the cheese plant is not in the local public interest. The protestants also allege that nitrates from dairy waste contaminate groundwater.

12. In its public witness comments, the city alleges that the application is not in the public interest, since the applicant might cease using water provided by the city and might cease using the wastewater treatment system of the city, thus depriving the city of user fees. The city also alleges there will be an expansion in use of water by the applicant, if the applicant uses its own well and still uses water provided by the city in the cheese plant or uses city water as a backup source of water for the cheese plant.

13. On May 15, 1992, the Director issued a moratorium order curtailing the use of surface and ground water within the Snake River Basin upstream from the USGS gauge on the Snake River near Weiser, Idaho ("Snake Plain Aquifer"). The moratorium was issued to prevent further development of water resources in the Snake Plain Aquifer to ensure compliance with provisions of chapter 2, title 42, Idaho Code. The Director subsequently amended the moratorium order on January 6, 1993 and April 30, 1993.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. Section 42-1805(7), Idaho Code, and IDAPA 37.03.08055 (Water Appropriation Rule 55) provide for the establishment of a moratorium preventing further development of a water resource in a designated area to ensure compliance with provisions of chapter 2, title 42, Idaho Code.

3. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

4. Both the applicant and the protestants have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

5. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

6. The moratorium designated by the Department on May 15, 1992 for the Snake Plain Aquifer was issued to prevent further development of water sources on the plain in order to protect prior water rights and to ensure compliance with provisions of chapter 2, title 42, Idaho Code.

7. The proposed point of diversion by the applicant for the cheese plant is within the Snake Plain Aquifer area. Since only a small unquantified portion of ground water which would not be pumped at the Hincks well would reach the proposed new well(s) located about 90 miles to the southwest, the diversion of 3.2 cfs or the majority thereof at the proposed new well(s) would have the same physical effect as a new appropriation of ground water and would cause injury because it would have a senior priority over validly established water rights held by junior appropriators.

8. It is not in the local public interest to approve a transfer that would essentially be a new appropriation of water which would otherwise be prevented by the moratorium.

9. The Department should deny the application.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5436 in the name of Jerome Cheese Company is **DENIED**.

Signed this __12th__ day of __October_____, 1999.

-Signed-

L. GLEN SAXTON
Hearing Officer